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In the Supreme Court of the United States

October Term, 1975

HARRY BENSON,
Petitioner,

v.

SAMBO'S RESTAURANTS, INC.,
Respondent.

Petition for Writ of Certiorari

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In the Supreme Court of the United States to: The Honorable, The Chief Justice and Associate Justices of The Supreme Court of The United States.

Harry Benson, the Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of California entered in the above-entitled case on February 26, 1975.

OPINIONS BELOW

The unreported Opinion of the Court of Appeal of the State of California, Second Appellate District, Division

Five, is appended hereto as Exhibit "A". The Order Denying Petition for Hearing in the Supreme Court of the State of California, dated February 26, 1975, is appended hereto as Exhibit "B".

JURISDICTION

The Order of the Supreme Court of the State of California affirmed the Judgment of the Court of Appeal of the State of California, Second Appellate District, Division Five, case number 2 CIV 42864, which Judgment reversed the Judgment of the Superior Court of the State of California for the County of Alameda, in favor of Petitioner herein and against Respondent.

The jurisdiction of this Court is invoked under the provisions of 28 USC §1257.

QUESTIONS PRESENTED

Were the findings of the Court of Appeal, as affirmed by the Supreme Court of the State of California, and the Judgment of Reversal entered thereon, so contrary to the evidence at trial, and to appropriate California law, as to constitute a denial to Petitioner of due process of law as provided by the Fourteenth and Fifth Amendments of the Constitution of the United States and Article I §13 of the Constitution of the State of California?

STATUTES INVOLVED

Constitution of the United States, Fifth Amendment, §*1*, "No person shall be held to answer for a capital, or

otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Fourteenth Amendment, §*1*, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, or citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Constitution of the State of California, Article I, §*13*, "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or

property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The legislature shall have the power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witnesses, from inability or other cause, will not attend at the trial."

STATEMENT

This case involves the validity of an alleged agreement to make a lease. Benson sued Sambo's Restaurants for damages for breach of an agreement to lease certain real property from Benson for use as a restaurant. The term of the lease was to have been twenty-five (25) years, plus a five (5) year option. The agreement is based upon an exchange of extensive correspondence between Benson and one William Wagner, president of Restaurant Properties, Inc., a wholly owned subsidiary corporation of Sambo's. At trial, a jury found for Benson and awarded him damages of One Hundred Seventeen Thousand Five Hundred and 00/100 ($117,500.00) Dollars.

In August of 1969, one Angelo C. Sposeto and his wife, Mary Sposeto, owned a certain parcel of land

situated on one of the corners of the intersection of East 14th Street and Warren Avenue in the City of San Leandro, Alameda County, California. The Petitioner, Harry Benson, was a licensed real estate broker who was the principal of Benson Realty Company, a California real estate brokerage corporation. On August 25, 1969, Mr. and Mrs. Sposeto granted to Benson Realty Company and exclusive listing for some 22,800 square feet of the 43,185 square feet owned by Sposeto at that particular corner of that particular intersection.

During August of 1969, Mr. Benson contacted the headquarters of Sambo's Restaurants, Inc., in Santa Barbara, California, with a view to interesting Sambo's in a portion of the above-mentioned property. The parcel initially presented to Sambo's was the so-called "front half" of the 43,185 square feet, which "front half" contained 22,360 square feet and had a 180-foot frontage on East 14th Street. Sambo's Restaurants, Inc., suggested that Mr. Benson contact one William L. Wagner, president of Restaurant Properties, Inc., a wholly owned subsidiary corporation of Sambo's. Restaurant Properties, Inc., was a real estate brokerage whose sole purpose was the location for properties to be utilized as Sambo's Restaurants.

On August 21, 1969, Mr. Benson directed a letter to Mr. Wagner at Mr. Wagner's office near Santa Barbara, confirming a telephone conversation held with Mr. Wagner earlier that same day. The letter enclosed a plot plan of the Sposeto property and generally that

Mr. Benson was attempting to "put one or two franchise restaurants on the front half of this property and thought you might be interested."

On August 24, 1969, Benson again called Wagner. Wagner advised Benson that the vice-president of Sambo's Restaurants, Inc., would visit San Leandro the following Wednesday, and Mr. Wagner further requested a plot plan for the property, which was duly sent by Mr. Benson.

On November 14, 1969, Benson spoke with Wagner with specific reference to a valuation price for the land under consideration. After further negotiations, he and Mr. Wagner settled upon a proposal price of $5.25 per square foot.

On March 21, 1970, Mr. Wagner wrote a letter to Mr. Benson confirming a telephone conversation between the two of them which had taken place on March 20, 1970. The letter stated that it could be considered as "our letter of intent for the proposed Sambo's Restaurant on East 14th Street and Warren Avenue in San Leandro . . ." The letter proceeded to outline the basic information suggested to establish the proposed rent and specified a maximum cost of building of $130,000.00

On July 28, 1970, Benson again called Wagner. He advised Wagner that he had discussed the proposed Sambo's lease with some potential buyers of the prop-

erty, and those potenital buyers wanted a higher return on the land and a higher overage rent percentage. Benson and Wagner orally agreed to terms, and Benson said he would present the deal to Sposeto, but that he was advising Wagner in advance that Sposeto would accept. Benson said that if Sposeto did not go through with the lease, Benson would buy the lease from Sposeto.

On August 12, 1970, Wagner wrote a letter to Benson. This letter stated that the letter of March 21, 1970, was to be deemed amended in certain respects. The basic purport of the letter was to reflect the increased percentages requested by Mr. Benson, and Wagner reiterated that the construction ceiling was to be $130,000.00. The letter also stated that "All other terms and conditions to remain the same."

On August 26, 1970, Mr. Wagner sent an unsigned copy of the form of "Real Property Lease" that Sambo's proposed to use for the lease between itself and Mr. Benson, so that Mr. Benson could present the lease to "developers."

On September 17, 1970, Mr. Benson met with Mr. Sposeto relative to the proposed lease transaction with Sambo's. At that conference, Mr. Sposeto notified Benson that he would not enter into the proposed lease transaction with Sambo's Restaurants, Inc. Thereafter, Mr. Benson communicated Mr. Sposeto's statement to Mr. Wagner and stated that it was necessary to "put someone else on that piece of property . . ."

Thereafter, on February 11, 1971, Mr. Wagner wrote a letter to Mr. Benson. He stated therein that "We are still prepared to lease the subject property on the terms and conditions as contained in (the letter of August 26, 1970) with this one provision. The lease agreement is subject to the final approval of Mr. R. L. Hild, vice-president of Sambo's Restaurants, Inc." Additionally, Wagner requested that the transaction be finalized by April 1, 1971, and indicated that the proposal would be considered outstanding until April 1. "We will consider this lease agreement binding until that date."

On March 21, 1971, Benson made an offer to the Sposetos to purchase the property owned by them. Following negotiations, a deal was concluded and escrow opened on April 19, 1971, and closed on December 15, 1971.

On April 29, 1971, Mr. Benson had a telephone conversation with Mr. Wagner. Wagner advised Benson that Mr. Hild wanted the corner location and would want the entire frontage along East 14th Street, with the service station and the "back half." Benson refused that proposal, characterizing it as "ridiculous." Additionally, Mr. Wagner told Benson that Hild had refused to consent to having a car wash next to the restaurant as desired by Benson, although Hild was willing to have a service station placed "along side" the restaurant. Further communications were had between Mr. Benson and Mr. Wagner and Mr. Hild. On June 1, 1971, Mr. Benson received a letter from Mr. Wagner

that specifically advised Mr. Benson that Hild would not approve the location as long as a car wash was to be placed next door to the restaurant. On June 29, 1971, Benson called Wagner. During that conversation, Wagner advised Benson that Hild definitely would not approve the location next to a car wash. Benson informed Wagner that in his opinion, a lease with Sambo's had been concluded and that Benson was going to continue to operate on that basis. Benson heard nothing further from Wagner or Sambo's after that.

Thereafter, Benson filed suit. Following trial by jury, Judgment was entered for Benson in the sum of One Hundred Seventeen Thousand Five Hundred and 00/100 ($117,500.00) Dollars. Sambo's appealed to the Court of Appeal for the State of California, Second Appellate District, Division Five. The Court of Appeal reversed the Judgment and directed the trial court to enter Judgment for Sambo's. Benson filed a timely Petition for Rehearing, which was denied. Benson thereafter filed a Petition for Hearing in the Supreme Court of the State of California, and the same was denied on February 26, 1975, without opinion.

The Court of Appeal, ruled that under California so-called "Equal Dignities Rule" (California Civil Code §2309), Wagner was required to have written authority from Sambo's in order to bind Sambo's to a lease agreement with Petitioner, and there was no evidence to support the existence of such a writing. The Court of Appeal further found that Sambo's was not estopped to assert the requirement of such writing.

The federal question sought to be reviewed herein was not raised prior to the filing of this Petition for Writ of Certiorari as Petitioner respectfully represents that the denial of due process did not occur until the Court of Appeal of the State of California reversed the Judgment of the Superior Court, which reversal was affirmed by the Supreme Court of the State of California by denying a Petition for Hearing.

REASONS FOR GRANTING THIS WRIT

The Court of Appeal of the State of California ruled that under California so-called "Equal Dignities Rule" (California Civil Code §2309), Wagner was required to have written authority from Sambo's in order to bind Sambo's to a lease agreement with Benson; that there was no evidence to support the existence of such a writing; and that Sambo's was not estopped to assert the necessity of such writing. By denying Benson's Petition for Hearing, the California Supreme Court, by implication, affirmed the findings of the Court of Appeal. Petitioner herein contends that those findings were so contrary to evidence at trial, as to constitute a denial of Petitioner's constitutional right to due process.

Petitioner herein concedes that this Honorable Court will refrain from interfering with the findings of the California Court of Appeal and Supreme Court, except upon the most extreme circumstances revealing the actions of said Courts to be in clear conflict with fundamental principles. In *Roberts* v. *New York* (1935) 295

US 264 (79 L.Ed 1429) (55 S.ct. 689), the Court stated, "If the error is gross and obvious, coming close to the boundary of arbitrary action, there may be a violation of the guaranty." There is ample precedent for granting rleief from incorrect state court decisions. In *American R. Export Co.* v. *Kentucky* (1927) 273 US 269 (71 L.Ed. 639), the Court observed, ". . . We cannot interfere, unless the judgment amounts to mere arbitrary or capricious exercise of power, or is clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights." See also, *Brinkerhoff Faris Trust and Savings* v. *Hill* (1930) 281 US 673 (74 L.Ed. 1107).

The Opinion of the Court of Appeal, a copy of which is appended hereto, holds that as a matter of law, the "Equal Dignities Rule" precludes a finding that Benson entered into a contract, binding on Sambo's, to lease real property for a term longer than one year. In so holding, the Court relies on the following: (1) the absence of written authority for Wagner to bind Sambo's; (2) the absence of any conduct of Sambo's which would lull a third party into believing that Wagner had such authority; and (3) the prior Opinion of the Court of Appeal in *McGirr* v. *Gulf Oil Corp.*, 41 Cal. App. 3d 246.

It is true, as stated in the Opinion, that there was no corporate resolution nor other document authorizing Wagner to enter into written lease agreements. However, as appears in the Opinion of the Court of Appeal,

the following does appear from the record: Prior to the formation of Restaurant Properties in 1970, Wagner was the head of the real estate department of Sambo's. Restaurant Properties was and is a wholly owned subsidiary of Sambo's. Wagner was the chief executive officer of this wholly owned subsidiary. Sambo's established guidelines for Wagner to follow and led him to believe that negotiations concluded within these guidelines would be acceptable to Sambo's.

Contrary to the implications of the Opinion of the Court of Appeal it is not true that ostensible authority can only be created by conduct of the principal directly with a third person. As stated in the case of *Meyer* v. *Ford Motor Co.*, 275 Cal. App. 2d 90, 102: ". . . the principal need not have been in direct contact with the third party; the manifestation of principal may be to the community at large, and may consist of appointing the agent to a particular position."

Also highly significant is the authority which the principal leads the agent to believe the agent possesses.

Here, Wagner represented in writing to Respondent that he had a contract to lease with Sambo's on the terms agreed to by the parties. One may infer that Wagner reasonably believed that he had authority to reach such agreement in view of (a) his position, (b) his having acted within the criteria given him, and (c) past approval of such conduct. The reliance on these communications, Benson took numerous steps to effec-

tuate the contract and restricted his negotiations with others on the basis of Appellant's being the leasee of a portion of the property in question.

* * *

It is manifest, therefore, that the Court of Appeal made an erroneous finding, contrary to existing California law, permitting Sambo's to rely upon the lack of written authority.

It is error to sanction a pattern of conduct on the part of Sambo's which led the principal officer of its wholly owned subsidiary and a third party, to believe that such officer had the authority to enter into a contract to make a long-term lease. Such a finding is manifestly unjust and so clearly contrary to the principles of fairness as to deny to Benson due process of law.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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